

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands)	WT Docket No. 03-66 RM-10586
)	
Part 1 of the Commission's Rules – Further Competitive Bidding Procedures)	WT Docket No. 03-67
)	
Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and the Instructional Television Fixed Service Amendment of Parts 21 and 74 to Engage in Fixed Two-Way Transmissions)	MM Docket No. 97-217
)	
Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Licensing in the Multipoint Distribution Service and in the Instructional Television Fixed Service for the Gulf of Mexico)	WT Docket No. 02-68 RM-9718
)	

REPLY COMMENTS

Choice Communications, LLC ("Choice") submits these reply comments addressing the *BRS/EBS FNPRM* in the above-captioned proceeding.¹

I. THE COMMISSION SHOULD RETAIN THE WIRELESS CABLE EXCEPTION

Several parties, including Choice, the Wireless Communications Association International ("WCAI"), and Clearwire Corporation ("Clearwire"), filed comments urging the

¹ See *Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands*, Report and Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd 14165 (2004) ("*BRS/EBS FNPRM*"). All comments submitted in this proceeding on January 10, 2005, will hereinafter be short cited.

Commission to retain the wireless cable exception, at least for markets that have not transitioned or for existing BRS licensees that file applications for vacant EBS spectrum prior to the Commission's adoption of any new rules in response to the *BRS/EBS FNPRM*.²

On the other hand, the Catholic Television Network ("CTN"), the National ITFS Association ("NIA"), and Hispanic Information and Telecommunications Network ("HITN") opposition to retaining the wireless cable exception is based solely upon unsubstantiated allegations. For example, CTN and NIA claimed that "it is clear that no new EBS channels will be available or needed for future commercial video use in this manner, whether prior to or after transitions in particular markets."³ Similarly, HITN surmised that the remaining blocks of vacant EBS spectrum are not sufficient both to permit commercial use and to meet the requirement that eight vacant EBS channels remain available in a market.⁴

To the contrary, large swaths of EBS spectrum have remained unused for more than 10 years in certain areas. In fact, at least 12 EBS channels have never been assigned in the Virgin Islands. Some of these channels could be put to commercial use, while the remaining eight channels could be reserved for EBS use, as required under Section 27.1201(c) (formerly Section 74.990(a)) of the FCC's rules. As both Choice and Clearwire attest, vacant EBS channels could be more quickly and efficiently used by BRS licensees that have a demonstrated need for additional spectrum to support their existing and future services.⁵

Furthermore, as Clearwire and WCAI correctly noted, the right to obtain vacant EBS channels under the wireless cable exception is included in the bundle of rights that BRS BTA

² See Comments of Choice at 2; Comments of WCAI at 30; Comments of Clearwire at 21-23.

³ Comments of CTN and NIA at 19.

⁴ Comments of Hispanic Information and Telecommunications Network at 10.

⁵ See Comments of Choice at 2; Comments of Clearwire at 21.

licensees acquired at auction.⁶ Specifically, when the Commission adopted licensing and service rules for BRS BTA licenses in 1995, it expressly determined that “only the BTA authorization holder will be qualified to submit any new application for MDS use of available ITFS frequencies within the BTA in accordance with 47 C.F.R. § 74.990(a).”⁷ To strip BRS BTA licensees that have paid valuable consideration for this right would be grossly inequitable. Consequently, retaining the wireless cable exception will serve the public interest by facilitating deployment of broadband services to consumers, particularly those in rural and underserved areas; by ensuring full and efficient use of spectrum that otherwise would remain fallow indefinitely; and by preserving the reasonable expectations of BRS licensees that acquired valuable rights at auction.

II. THE COMMISSION SHOULD ASSESS REGULATORY FEES BASED ON MHz/POPs

All of the parties addressing the issue favored assessing BRS regulatory fees based on MHz/pops.⁸ Additionally, Nextel and WCAI urged the Commission to establish clearer standards for determining the boundaries of a licensee’s geographic service area (“GSA”) and the population within the GSA.⁹ Choice agrees that the Commission should establish clear standards to enable BRS licensees readily to determine the population within their GSAs and to ensure that regulatory costs are allocated equitably among BRS licensees.

⁶ See Comments of Clearwire at 21-22; Comments of WCAI at 30.

⁷ *Amendment of Parts 21 and 74 of the Commission’s Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service*, Report and Order, 10 FCC Rcd 9589, ¶ 41 (1995).

⁸ See Comments of Choice at 2-3; Comments of Nextel at 11-12; Comments of WCAI at 32-33.

⁹ See Comments of Nextel at 11-12; Comments of WCAI at 32-33.

III. THE COMMISSION SHOULD ADOPT A SUBSTANTIAL SERVICE REQUIREMENT AND SAFE HARBORS

The Commission's proposal to revise the BRS build-out requirements to provide for substantial service in lieu of construction benchmarks received unanimous support among the parties addressing the issue.¹⁰ In view of this consensus, the Commission should adopt the substantial service requirement to allow BRS licensees maximum flexibility in deploying their systems. To facilitate a licensee's demonstration of substantial service, the Commission also should adopt safe harbors, including existing BRS construction benchmarks. Adoption of these benchmarks as safe harbors will permit greater regulatory certainty and ensure that BRS licensees will not bear heavier regulatory burdens under the new substantial service requirement than under the existing build-out rules.

Additionally, a number of parties, including WCAI and BellSouth,¹¹ urged the Commission to apply to BRS and EBS licensees operating in rural areas the same rural safe harbors adopted in the *Rural Wireless Order*.¹² Under these rural safe harbors, a licensee will be deemed to have provided substantial service if (1) for fixed services, it constructs "at least one end of a permanent link in at least 20 percent of the number of 'rural areas' within its licensed area"; or (2) for mobile services, it provides coverage to "at least 75 percent of the geographic area of at least 20 percent of the 'rural areas' within its licensed area."¹³ Choice agrees that these

¹⁰ See, e.g., Comments of BellSouth at 3; Comments of C&W Enterprises at 2; Comments of the Catholic Television Network & the National ITFS Association at 7-8; Comments of Clearwire at 12; Comments of Nextel at 2; Comments of Sprint at 5; Comments of WCAI at 2.

¹¹ See Comments of WCAI at 9; Comments of BellSouth at 8-9.

¹² See *Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies to Provide Spectrum-Based Services*, Report and Order and Further Notice of Proposed Rule Making, 19 FCC Rcd 19078, ¶ 79 (2004) ("*Rural Wireless Order*").

¹³ *Id.*

safe harbors will facilitate wireless deployment in rural areas and that BRS/EBS licensees in rural markets should be entitled to the same safe harbors as other Part 27 licensees. Choice further urges the Commission to extend the rural safe harbors to remote and underserved areas, such as the Virgin Islands.

IV. THE COMMISSION SHOULD ALLOW INCUMBENTS TO SELF-TRANSITION

The record reflects broad support for procedures allowing BRS and EBS incumbents to transition themselves to the new band plan if no party files an initiation plan.¹⁴ This solution is much more equitable than stripping incumbents of their licenses in those cases where potential proponents are unable or unwilling to submit a transition plan.

V. CONCLUSION

Based on the foregoing, Choice urges the Commission to retain the wireless cable exception, assess regulatory fees based on MHz/pops, adopt a substantial service requirement and appropriate safe harbors, and provide for self-transition procedures.

Respectfully submitted,

¹⁴ See, e.g., Comments of C&W Enterprises at 3-4; Comments of the Catholic Television Network & the National ITFS Association at 16-18; Comments of Hispanic Information and Telecommunications Network at 6-9; Comments of Nextel at 5-7; Comments of Sprint at 4-5; Comments of WCAI at 17-19.

CHOICE COMMUNICATIONS, LLC

Cheryl A. Tritt
Phuong N. Pham
Morrison & Foerster LLP
2000 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Its Attorneys

Date: February 8, 2005

/s/ Douglas J. Minster

Douglas J. Minster
Vice President and General Counsel
Atlantic Tele-Network, Inc.
9719 Estate Thomas
St. Thomas
U.S. Virgin Islands 00802

CERTIFICATE OF SERVICE

I, Theresa Rollins, hereby certify that a copy of the foregoing **REPLY COMMENTS** has been served this 8th day of February 2005 by electronic mail on the following:

Bryan Tramont
Office of Chairman Powell
Federal Communications Commission
445 12th Street, S.W., 8th Floor
Washington, D.C. 20554
E-Mail: bryan.tramont@fcc.gov

Paul Margie
Office of Commissioner Copps
Federal Communications Commission
445 12th Street, S.W., 8th Floor
Washington, D.C. 20554
E-Mail: paul.margie@fcc.gov

Barry Ohlson
Office of Commissioner Adelstein
Federal Communications Commission
445 12th Street, S.W., 8th Floor
Washington, D.C. 20554
E-Mail: barry.ohlson@fcc.gov

Catherine Seidel
Office of the Bureau Chief
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554
E-Mail: cathy.seidel@fcc.gov

Uzoma Onyeije
Office of the Bureau Chief
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554
E-Mail: uzoma.onyeije@fcc.gov

Jennifer Manner
Office of Commissioner Abernathy
Federal Communications Commission
445 12th Street, S.W., 8th Floor
Washington, DC 20554
E-Mail: jennifer.manner@fcc.gov

Sam Feder
Office of Commissioner Martin
Federal Communications Commission
445 12th Street, S.W., 8th Floor
Washington, D.C. 20554
E-Mail: sam.feder@fcc.gov

John Muleta
Office of the Bureau Chief
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554
E-Mail: john.muleta@fcc.gov

D'Wana Terry
Office of the Bureau Chief
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554
E-Mail: dwana.terry@fcc.gov

John Schauble
Broadband Division
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554
E-Mail: john.schauble@fcc.gov

Nancy Zaczek
Broadband Division
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, S.W., Room 3-C124
Washington, DC 20554
E-Mail: nancy.zaczek@fcc.gov

Stephen Zak
Broadband Division
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, S.W., Room 3-C124
Washington, DC 20554
E-Mail: stephen.zak@fcc.gov

Erik Salovarra
Auctions and Spectrum Access Division
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, S.W., Room 4-A760
Washington, DC 20554
E-Mail: Erik.Salovaara@fcc.gov

Genevieve Ross
Broadband Division
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, S.W., Room 3-C124
Washington, DC 20554
E-Mail: genevieve.ross@fcc.gov

William Huber
Auctions and Spectrum Access Division
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, S.W., Room 4-A760
Washington, DC 20554
E-Mail: william.huber@fcc.gov

Best Copy and Printing, Inc.
Portals II
445 12th Street, SW
Courtyard Level
Washington, DC 20554
fcc@bcpiweb.com

/s/ Theresa Rollins

Theresa Rollins